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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 180

KEROTEST MANUFACTURING COMPANY,
Petitioner,

v.

C-O-TWO FIRE EQUIPMENT COMPANY, Respondent.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

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I.

The conflict of judges and courts in this case, and the conflict of the instant decision with decisions in other Circuits, shows a state of confusion as to rules of priority of actions under the Declaratory Judgment Act and Rule 57, Rules of Civil Procedure, and demonstrates the need for a guiding decision by this Court.

The record is clear on the facts but there is confusion as to the law and legal policy which should control. Two District Court hearings (R. 2a, 3a) and three Court of Appeals hearings (R. 49, 53, 69) led to the filing of the present petition for certiorari, and when the Court of Appeals, upon rehearing *en banc,* reversed the decision of the district judge, Judges Maris and Kalodner dissented (R. 75). Judge Maris, who wrote the dissenting opinion herein, previously wrote the opinion of the Court

of Appeals in all three of the leading cases in the Third Circuit* which were cited as guiding precedents in the conflicting decisions in other Circuits.‡

The determination of priority between declaratory actions and infringement suits copending in different districts is a matter of great importance in patent litigation and related fields, and a guiding decision by this Court is needed so that lower courts may make such determinations without delay and expense such as that to which petitioner has been subjected in the present action.

II.

There is a clear conflict between Circuits.

The dissenting opinion of Judges Maris and Kalodner points out the conflict between *Cresta Blanca Wine Co. v. Eastern Wine Corporation,* 143 F. 2d 1012 (C.A. 2, 1944) and *Speed Products Co. v. Tinnerman Products,* 171 F. 2d 727 (C.A.D.C., 1948), on the one hand, and the final majority decision of the Court of Appeals herein on the other hand (R. 76-78). The opinion of the District Court filed August 18, 1951 likewise

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* *Crosley Corporation v. Hazeltine Corporation,* 122 F. 2d 925 (C.A. 3, 1941); *Triangle Conduit & Cable Co. v. National Electric Products Corporation,* 125 F. 2d 1008 (C.A. 3, 1942); and *Crosley Corporation v. Westinghouse Electric & Mfg. Co.,* 130 F. 2d 474 (C.A. 3, 1942).

‡ *Cresta Blanca Wine Co. v. Eastern Wine Corporation,* 143 F. 2d 1012, 1014 (C.A. 2, 1944); and *Speed Products Co. v. Tinnerman Products,* 171 F. 2d 727, 729, 730 (C.A.D.C., 1948).

supports this conclusion (R. 40a). The majority opinion of the Court of Appeals limits its comment on these decisions to the single observation, *"Cf."* (R. 74).

Respondent does not attempt to answer the reasoning of Judge Maris but instead attempts to obscure the conflict by referring only to selected portions of the cases and by attempting to argue that the *Cresta Blanca* decision in the Second Circuit, insofar as it is in conflict with the instant decision, was overruled by the later Second Circuit decision in *Hammett v. Warner Bros. Pictures,* 176 F. 2d 145 (C.A. 2, 1949); see respondent's brief, p. 8. The latter contention, however, rests on a mere generality quoted from the *Hammett* opinion, and respondent wholly fails to answer the points made in petitioner's brief (pp. 17, 18) regarding the *Hammett* case.

Respondent bases its analysis of the conflicting decisions cited by petitioner on the false premise that petitioner is seeking "duplicate litigation". Petitioner is not seeking to duplicate its litigation with respondent but, on the contrary, is seeking to conduct its own litigation in Delaware independently of the litigation separately instituted by respondent against a third party (Acme) in Chicago. These two litigations are not between the same parties and consequently are not duplicates (pet. br., p. 18).

III.

A prompt trial, without extraneous issues, may be had in Delaware.

Respondent's present position, that "there are no extraneous issues" in the Chicago action (resp. br., p. 9), is contrary to the affidavit of its counsel that the Chicago action against Acme includes any other infringing valves in addition to those purchased from petitioner (R. 12a). The affidavit thereby concedes a further distinction between petitioner's litigation against respondent in Delaware and respondent's separately instituted litigation against Acme in Chicago.

Respondent further asserts that "Petitioner, plainly, is more interested in delay than prompt trial" (resp. br., p. 10). That statement is applicable to respondent rather than to petitioner, since petitioner has consistently sought a prompt trial of its action against respondent in Delaware, which could have been obtained with respondent's cooperation (R. 41a). Instead, respondent amended its Chicago action to add petitioner as a party defendant and moved for a stay of the Delaware action, notwithstanding the delay caused by this tactic and the fact that a trial may be had at least as soon in Delaware as in Chicago (R. 41a, 45a). Moreover, respondent gave notice of alleged infringement to petitioner before commencing either of its two infringement suits against petitioner's customers (R. 6a), yet delayed making petitioner a party to any customer suit until after petitioner sued respondent in Delaware, and then offered no reason for joining petitioner in the customer suit *except* the fact that petitioner had commenced the

Delaware action (R. 12a; cf. 39a). Respondent has previously made a like contention that petitioner is seeking delay (R. 81) which was overruled by the Court of Appeals (R. 85).

Respectfully submitted,

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